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ALALALAI! . . . ROJADIRECTA IS UP FOR BATTLE AGAIN IN ITALY

By **Giancarlo Frosio** on September 6, 2013 at 11:30 pm



The ongoing claims against the Rojadirecta website for linking to streams of sporting events are novel and quite important in defining the rights and responsibilities of intermediaries that host links to possibly infringing content stored elsewhere. While the U.S. case against Rojadirecta was resolved a few years ago, litigation continues in Italy. As an Italian scholar who just moved to the Center for Internet and Society to serve as the Intermediary Liability Fellow, I'd like to update readers on the latest Italian episode of the Rojadirecta saga and to locate this new case within the broader Italian legal framework for intermediary liability.

First, some background:

As you may remember, Rojadirecta is a website offering an exhaustive, well-maintained database of links to sporting events streamed over the Internet by other entities, mostly illegally. In 2011, entities owning the rights to broadcast sporting events prevailed on U.S. authorities to seize the rojadirecta.com and .org domain names as part of the "[Operation in Our Sites](#)" anti-piracy campaign. Stanford Law School's Mark Lemley filed an appeal the Second Circuit arguing that links to streaming video are not themselves infringing, therefore Rojadirecta was not directly or secondarily liable for criminal copyright infringement, and the domain name therefore should be returned. [You may find the appellate brief [here](#)]. Meanwhile, the influential Judge Posner issued an opinion in [Flava Works, Inc. v. Gunter](#) holding that links do not infringe copyright. Also known as the

myVidster case, *Flava Works* absolved the “social bookmarking” website that allowed users to link to videos hosted elsewhere from direct or secondary copyright liability. The parallels with Rojadirecta were clear, and soon thereafter, the U.S. Department of Justice agreed to return the rojadirecta domain names to the registrant.

Meanwhile, in Spain, Rojadirecta’s owners were acquitted of criminal charges for copyright infringement by an April 2010 decision of the *Audiencia Provincial de Madrid*, the Madrid Appellate/Provincial Criminal Court, in a case promoted by *Audiovisual Sports*. In a nutshell, the Madrid courts saw Rojadirecta as a “mere intermediary” simply providing links to enable users to watch sport events, without any involvement with the actual infringement that was occurring elsewhere. Additionally, the judicial authority noted, although the site included advertising, no profits were made in direct connection with any act of infringement.

After “victories” in Spain and the United States, the Rojadirecta battle cry sounded for a third time in Italy. There, Rojadirecta faces a *civil action* from 2011, and a criminal copyright charge under *Art. 171 of the Italian Copyright Law*, which is the main focus of this post. Unlike in the U.S., authorities did not seize the Rojadirecta domain. Rather, in July an Italian *Giudice delle Indagini Preliminari* of the Tribunal of Milan, a magistrate in charge of preliminary investigations in a criminal case, ordered Italian Internet Service Providers to prevent access within Italy to all present and future IP numbers associated with the Rojadirecta domain names. This action against Rojadirecta takes place against a broader trend of using criminal charges to confront alleged copyright infringement because civil claims are perceived as ineffective. In particular, in January 2013, the same judge as in the pending Rojadirecta case blocked access to ten other websites streaming sports events for free, upon a criminal complaint from Mediaset.

In Rojadirecta’s Italian case, the court ordered the website blocked *ex parte* – with no notice to the domain registrant and no adversary hearing of any kind – upon a preliminary finding of criminal copyright infringement. If the domain’s registrant does not react to this initial decision, the court conducts no further review and ISPs must continue to block access to the sites. However, Rojadirecta has opposed the preliminary decision and asked the Tribunal of Milan for a reexamination of the case. Rojadirecta’s reaction is the first case of this kind in Italy. Therefore, the next procedural developments are set to become a critical moment for defining criminal liabilities, under Italian law, of websites linking to infringing materials online.

Argument in the case has already taken place and a decision is expected sometimes after the summer. The ultimate decision will depend on the court’s resolution of a few important copyright issues under Italian law: (i) what are the rights directly infringed by streaming sporting events without the necessary authorization; (ii) are indexing and linking infringing; (iii) is preliminary injunctive relief to block access to the allegedly infringing sites appropriate; and, finally, (iv) how to resolve the constitutional concerns raised by applying a measure inhibiting access to IP numbers.

First, are sport events copyrightable or are there other rights that would be infringed by streaming a sport event online? Both in Europe and the United States, sports events as such are not a valid copyright subject matter. In the October 2011 *Football Association Premier League Ltd and Others v. QC Leisure and Others* decision, the European Court of Justice denied the possibility of claiming copyright in soccer “matches themselves, as those sporting events cannot be considered to be an author’s own intellectual creation.” In the United States, the Second Circuit Court of Appeals came to a very similar conclusion almost fifteen years ago, discussing basketball games in *NBA v. Motorola*.

However, the European Court of Justice has upheld the admissibility of alternative legal tools to protect sporting events. The ECJ justified the creation of *sui generis* rights to protect sport events by noting that “sporting events, as such, have a unique and, to that extent, original character which can transform them into subject-matter that is worthy of protection comparable to the protection of works, and that protection can be granted, where appropriate, by the various domestic legal orders.” A *sui generis* right – or quasi-copyright – is a legal instrument that may be specifically created to cover subject matters that would fall outside of the scope of copyright and to which different requirements of protection might apply.

Italy has adopted one of such provisions granting a *sui generis* protection to sports events with the Legislative Decree N. 9 of January 9, 2008. These *sui generis* “audiovisual rights” last for 50 years from the time the events take place and include fixation, reproduction, and communication or making available to the public of the audiovisual content of the event through electronic means. Websites streaming sporting events online would therefore directly infringe these *sui generis* rights, if they do not obtain in advance the necessary permission, for each specific territorial segment, from the sport teams and the federations managing the competition.

This arrangement is not very dissimilar from that in place in the United States, where through a mixture of jurisprudentially made quasi-property rights, copyright law and antitrust provisions, the ownership of the broadcasting rights in sports events is primarily held by the professional sports teams staging the events and the leagues. Usually, both in Europe and the United States, sporting teams and leagues license their rights to media and broadcasting companies.

Second, the court has to decide whether a web portal's indexing, and linking to, those infringing sites violates the same "audiovisual rights." In this instance, the Italian supreme court has come to the opposite conclusion of that recently embraced by Judge Posner in *Flava Works*. The Italian governing caselaw here is the result of an action initiated against *Coolstreaming and Calciolibero* by the TV broadcaster Sky. Coolstreaming and Calciolibero facilitated access to soccer games, which were originally streamed by a Chinese broadcaster, by providing online information and links allowing viewers to connect directly to the Chinese servers. Initially, the first two levels of judicial review had denied any form of infringement of others' exclusive rights through this conduct. However, the Italian *Corte di Cassazione*, the judicial body of last resort in Italy, reversed. The *Corte di Cassazione* construed indexing and linking as a contributory infringement because "undeniably, the defendants have aided and abetted, through the provision of a system of online guidance, the connection and synchronization to the sporting event; absent the defendants' activities, the making available to the public of the protected works would not have occurred or would have occurred to a more limited extent."

In the Court's view, the illegal conduct can be distinguished from, say, a common search engine because Coolstreaming and Calciolibero had come up with actions that causally determined the infringement by providing the users with an online guidance that made the infringement possible. In particular, the Court noted that such guidance included the provision of the necessary technical means to watch the sporting event, such as information on the software that the users had to download in order to watch the stream and links both to the software and the streamed event. The 2011 civil action between *Reti Televisive Italiane and Rojadirecta* – the sole Italian precedent discussing Rojadirecta's conduct – also concluded that Rojadirecta "consciously and willfully" aided and abetted the infringement of the right to broadcasting sporting events because "the linking activity, which may in itself be legit, is functionally integrated in a broader activity facilitating and contributing to the infringement of the exclusive rights [of the rightholder]." In conclusion, the Court stated, "undoubtedly, Rojadirecta had a willful knowledge of the unlawfulness of its actions which have been carried out with the clear goal of commercially exploiting the broadcasted sporting events through the placement of advertisements."

These arguments may sound familiar to U.S. readers as they resemble Grokster-like conclusions, at least to the extent that the Italian jurisprudence refers to the notion of "aiding and abetting" infringement, although it does not specifically refer to any notion that may be connected with that of "inducement." However, the Italian judicial approach, which tend to rely more on principles of law rather than fact-finding, seems not to be helpful in satisfactorily qualifying the contributory infringing conduct, as Grokster instead does. In particular, Grokster is based on a definition of inducement that is narrowed down by specific evidence of bad intent. In contrast, in Italian caselaw, it is difficult to identify what that evidence of bad intent is or how bad it has got to be before triggering liability. This, in turn, potentially expands intermediary liability in unknown directions, does not provide other courts with a clear set of factually based principles to discern lawful from unlawful conducts, and leaves intermediaries in a state of legal uncertainty.

However, standing on the mentioned Italian precedents, in the Rojadirecta case of July 2013, the Judge stated that Rojadirecta "represents a portal for the abusive communication to the public of sporting events in violation of others' exclusive rights" and, as in the previous January decision, confirmed the "admissibility of a 'preliminary seizure' measure against Internet websites, which – by linking to foreign websites lacking any exclusive rights for the broadcasting on the Italian territory – allow Italian users to watch soccer games in violation of the copyright of the rightholder to whom the neighboring broadcasting rights belong."

The Judge's mention to validity and type of injunctive relief that can be granted introduces the **third** critical issue that courts must decide in intermediary liability cases. While Italian jurisprudence refers to "preliminary seizure", no seizure of the domain takes place. Rather ISPs are ordered to prevent access to the website from Italian territory. The domain is still in the possession of the original registrant. Handing in its decision, the Judge concluded that "blocking [Rojadirecta] through ordering the Internet service Providers to inhibit access to the website stands as the sole possible measure to contrast [the copyright infringement]."

The validity of 'preliminary seizure' measures in intermediary liability and, more broadly, Internet cases has been long debated in Italy. The measure was applied for the first time in 2008 by a Judge in Bergamo in the *Piraterbay* case and then confirmed by the Italian *Corte di Cassazione*. The solution finally adopted by the Italian jurisprudence departs considerably from the legal principles at work under U.S. law. The *Cassazione* has endorsed a principle upon which the judiciary is entrusted with the power of ordering the intermediaries to provide a material aid to prevent further copyright infringement by blocking access to websites which are found guilty of the crime provided under Art 171-ter (2) a-bis) – holding criminally liable "any person who [in breach of the exclusive right to communicate and make available to the public], *for profit*, communicates to the public a work protected by copyright, or part thereof, by inserting it into a system of computer networks, through connections of any kind." In the own words of the *Cassazione*, not only "the court may order the preliminary seizure of the website through which the operator contributes to the criminal activity of disseminating copyrighted works on the Internet, without authorization," but may also require, "at the same time, that the *Internet Service Providers block access to the site in order to debar the activity of illegal dissemination* of these works."

In applying the injunctive relief and ordering the ISPs to block access to the website, the recent Milanese decision against Rojadirecta has found the “for profit” motive requested by Art 171-ter (2) a-bis) of the Italian Copyright Law by emphasizing the fact that the activities of Rojadirecta are “for profit” due to “online advertising”. As the judge noted, Rojadirecta “appropriates volumes of online traffic generated by users’ watching the sporting event for free, therefore making a profit from the numerous online ads.”

The Rojadirecta cases show that Italy is setting up one of the harsher online environments for intermediaries. It often pursues copyright as a criminal case, rather than civil. This, in turn, allows the judicial authority to force Internet Service Providers to inhibit access to the infringing sites, which is a remedy unavailable in civil proceedings.

This brings us to the **final concern**, the use of these blocking orders to force innocent ISPs to participate in online censorship. The *Osservatorio Censura*, a watchdog documenting the state of online censorship in Italy, has listed close to 200 websites that have been censored by orders of the criminal judicial authority, which have quadrupled in the last year or so with roughly 150 new domains blocked since the beginning of 2012. (The entire list includes approximately 6000 censored websites, most of which, in fact, are blocked upon order of the Italian Border Authority and the National Center Against Online Child Pornography). Criminal enforcement – especially if deployed against indirect copyright infringement – can raise constitutional concerns and curtail civil liberties and users’ rights. In particular, as Fulvio Sarzana di Sant’Ippolito, the Italian attorney defending Rojadirecta in this last case before the Tribunal of Milan, has noted, “blocking access to IP numbers from the Italian territory, which has been adopted as a standard by Italian judicial authorities, may raise serious concerns in connection with the violation of basic constitutional freedoms.” If multiple domains are hosted on the same IP address – and there may be even several thousand domains hosted on one IP – blocking access to IP numbers may trample users’ rights to access online resources, website owners’ right of free speech and website owners’ right of conducting business. These are constitutionally mandated rights in Italy, so courts ought to carefully review the implications of applying any legal rule that may put those superior principles in jeopardy.

We’ll keep watching Rojadirecta, as efforts to stop the site push some of the most interesting copyright decisions toward judicial examination.

Meanwhile, have a great day. . . and remember to check on the Stanford CIS intermediary liability focus section once in a while to hear the next “alalalai” in the ongoing world war for final domination of the digital realm (and, again, please leave your comments; they would be very much appreciated, and, if you do, I may even tell you what “alalalai” is all about).

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